Supreme Court, U.S.
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Nos. 03-7434, 03-878

IN THE

Supreme Court of the United States

DANIEL BENITEZ, *Petitioner,*

v.

JOHN MATA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PHIL CRAWFORD, *et al.*, *Petitioners,*

v.

SERGIO SUAREZ MARTINEZ, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES JOHN DOOLITTLE, LAMAR SMITH, AND DAVE WELDON, ALLIED EDUCATIONAL FOUNDATION, FRIENDS OF IMMIGRATION LAW ENFORCEMENT, AND NATIONAL BORDER PATROL COUNCIL AS *AMICI CURIAE* IN SUPPORT OF FEDERAL PARTIES

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1231(a)(6) requires the release into American society of an inadmissible alien apprehended at the border of the United States and ordered removed if, after a six-month period of detention, the evidence suggests that there is no significant likelihood that the alien can be returned to his native country in the reasonably foreseeable future -- even when the government has determined that the alien presents a danger to public safety.

2. Whether continued detention of an inadmissible alien apprehended at the border of the United States under the scenario described above violates the alien's substantive due process rights under the Fifth Amendment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. § 1231(a)(6) DOES NOT PROHIBIT THE INDEFINITE DETENTION OF EXCLUDABLE ALIENS WHO POSE A PUBLIC SAFETY RISK 11

II. PROCEDURAL DUE PROCESS ISSUES ARE NOT PROPERLY BEFORE THE COURT 15

III. DETENTION OF EXCLUDABLE ALIENS DETERMINED TO POSE A PUBLIC SAFETY THREAT DOES NOT VIOLATE THE ALIENS' SUBSTANTIVE DUE PROCESS RIGHTS 17

A. Rejection of the Substantive Due Process Claims Does Not Hinge on the Continued Vitality of *Mezei* 20

IV. MARIEL CUBANS ARE NOT ENTITLED TO GREATER SUBSTANTIVE DUE PROCESS RIGHTS THAN OTHER EXCLUDABLE ALIENS 24

Page

V. NATIONAL SECURITY CONCERNS COUNSEL GRANTING GOVERNMENT POWER TO DETAIN EXCLUDABLE ALIENS INDEFINITELY 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Chin Yow v. United States,
208 U.S. 8 (1908) 23
The Chinese Exclusion Case,
130 U.S. 581 (1889) 29
Demore v. Kim,
538 U.S. 510 (2003) 18
Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 29
The Japanese Immigration Case,
189 U.S. 86 (1904) 23
Jean v. Nelson,
727 F.2d 957 (11th Cir. 1984) 29
Kwong Hai Chew v. Colding,
344 U.S. 590 (1953) 3, 29
Landon v. Plasencia,
459 U.S. 21 (1982) 12, 15
Leng May Ma v. Barber,
357 U.S. 185 (1958) 19
Lin Guo Xi v. INS,
298 F.3d 832 (9th Cir. 2002) 7, 16
Mathews v. Diaz,
426 U.S. 67 (1976) 18
Mathews v. Eldridge,
424 U.S. 319 (1976) 17
Miller v. French,
530 U.S. 327 (2000) 14
Palko v. Connecticut,
302 U.S. 319 (1937) 18
Reno v. Flores,
507 U.S. 292 (1993) 15

Page

Rochin v. California,
342 U.S. 165 (1952) 18
Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) ..... *passim*
United States v. Salerno,
481 U.S. 739 (1987) 18
United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 21
Zadvydas v. Davis,
533 U.S. 678 (2001) ..... *passim*

Statutes and Constitutional Provisions:

U.S. Const., amend. v, Due Process Clause ..... *passim*

8 U.S.C. § 1182(a) 8

8 U.S.C. § 1182(d)(5) 3

8 U.S.C. § 1182(d)(5)(A) 8, 14

8 U.S.C. § 1231(a)(6) ..... *passim*

8 C.F.R. § 212.12 17

8 C.F.R. § 212.12(g)(2) 17

Page

Miscellaneous:

Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 HARV. L. REV. 1362 (1953) 23

"High Court to Decide Fate of Refugee," *Miami Herald* (April 18, 2004) 3

"Castro's 'Crime Bomb' Inside U.S.," *U.S. News & World Report* at 27 (Jan. 16, 1984) 27

"Trouble in Paradise,"
Time at22 (Nov. 23, 1981) 27

"Carter and the Cuban Influx,"
Newsweek at 22 (May 26, 1980) 26

"President Moves to Halt Illegal Cuban Boatlift,"
Washington Post at A1 (May 15, 1980) 27

"U.S. Will 'Open Arms' to Cuban Exiles, Carter Says,"
Washington Post at A1 (May 6, 1980) 26

"Navy Ships Will Monitor Cuban Boatlift,"
Washington Post at A1 (May 1, 1980) 25

"Angry Cuban-Americans Criticize U.S. Policy on Refugees,"
Washington Post at A1 (April 27, 1980) 25

"U.S. Intends to Stem Cuban Refugee Tide,"
Washington Post at A1 (April 25, 1980) 25

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Demore v. Kim,* 538 U.S. 510 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Honorable John Doolittle, the Honorable Lamar Smith, and the Honorable Dave Weldon are United States Representatives from California, Texas, and Florida, respectively. They believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by detaining, pending removal, those inadmissible aliens who pose a threat to public safety.

Friends of Immigration Law Enforcement (FILE) is an association of attorneys, researchers, law enforcement officers, legislators, and other experts working on behalf of Americans to ensure that immigration law is being enforced. FILE assists in filing lawsuits and complaints and helps Americans who have been harmed by our government's failure to enforce immigration law.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

Founded in 1965, the National Border Patrol Council is the labor organization representing all (currently about 9,000) non-supervisory U.S. Border Patrol employees. The U.S. Border Patrol is a component of the U.S. Department of Homeland Security, charged with securing the nation's borders.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to detain inadmissible aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, as a result of decisions from the Sixth and Ninth Circuits, scores of criminal aliens at this moment are walking freely on the nation's streets, despite having been convicted of serious felonies, despite being subject to final orders of exclusion/inadmissibility, despite never having been admitted into the country, and despite repeated INS/ICE determinations that they pose a danger to the community. *Amici* are filing an *amicus curiae* brief in this case because they believe that the rights of the public to be protected from the threat posed by dangerous inadmissible aliens outweigh whatever rights those inadmissible aliens may have to live freely within the United States.

Amici are also concerned by the national security and foreign policy implications of the decision below. The Sixth and Ninth Circuits have essentially held that the federal

government is powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. By depriving the government of the option of detaining such individuals until the foreign country agrees to take them back, the Sixth and Ninth Circuits have left a large "'unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

STATEMENT OF THE CASE

Daniel Benitez (Petitioner in No. 03-7434) and Sergio Suarez Martinez (Respondent in No. 03-878) are among 125,000 Cubans who attempted to enter the United States illegally during the 1980 Mariel boatlift. A considerable number of those Cubans (including Benitez) had extensive criminal records while in Cuba:[2] Cuban leader Fidel Castro released numerous individuals from Cuban prisons and mental institutions and included them among those fleeing the Castro dictatorship by boat from the port of Mariel, Cuba. The Mariel Cubans were intercepted along the coast of Florida and were excluded from the United States. However, Castro refused to permit the Mariel Cubans to return home. As a result, the vast majority of the Mariel Cubans (including Benitez and Martinez) were temporarily paroled into this country, pursuant to 8 U.S.C. § 1182(d)(5), until such time as they either: (1)

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[2] Benitez recently told the Miami Herald that he was imprisoned in Cuba in 1973 for committing an armed robbery of a food market. App. 3a. According to the Herald, "Benitez was still in jail when Mariel happened in 1980. Benitez, then 22, and other prisoners were put on board a boat whose captain had gone to Mariel to pick up relatives. The Cuban government loaded thousands of criminals on the boats." *Id. See* "High Court to Decide Fate of Refugee," *Miami Herald* (April 18, 2004) (reprinted at Appendix A).

were deemed eligible for reclassification as resident aliens and permitted to remain here on a permanent basis; or (2) could be returned to Cuba. To date, although many thousand Mariel Cubans have been deemed ineligible for reclassification and ordered removed, less than 2,000 have been repatriated to Cuba.

While free on parole, Benitez and Martinez wasted no time accumulating extensive criminal records. In 1983, Benitez was convicted in Dade County, Florida, of second degree grand theft and was sentenced to three years' probation. No. 03-7434, Joint Appendix ("J.A.") 60. In 1993, Benitez pled guilty to a multi-count criminal indictment in Florida state court. Specifically, he pled guilty to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale, or delivery of a firearm with an altered or removed serial number. *Id.* at 62. The state court sentenced Benitez to 20 years' imprisonment. *Id.* In 2001, with 12 years remaining on his sentence, Florida paroled Benitez and released him into the custody of the Immigration and Naturalization Service (INS). *Id.* at 61.

Martinez was convicted of numerous crimes while on immigration parole, including assault with intent to murder (1983), burglary (late 1980s), petty theft with a prior conviction (1996 -- for which he received a two year prison sentence), assault with a deadly weapon (1998 -- sentenced to three years imprisonment), and attempted oral copulation by force (1999 -- sentenced to two years imprisonment). Petition in No. 03-878 ("Pet.") 7-8. Following completion of his final prison sentence in California, Martinez was released into the custody of the INS. *Id.* at 8.

Although many other Mariel Cubans paroled into the United States in 1980 were soon thereafter reclassified as permanent resident aliens, both Benitez and Martinez were denied reclassification because of their criminal convictions. J.A. 61. The INS revoked Benitez's immigration parole in 1993 (following his 1993 criminal conviction), and in 1994 found that Benitez was both excludable and deportable because of his criminal convictions. *Id.* 62. The INS revoked Martinez's immigration parole in December 2000 based on his criminal convictions. Pet. 8. In January 2001, an Immigration Judge determined that Martinez is removable and ordered him removed to Cuba. *Id.* Martinez waived an administrative appeal. *Id.* U.S. Immigration and Customs Enforcement ("ICE," the successor to the INS) has been unable to arrange their removal to Cuba, and is unlikely to be able to do so in the near future.

Proceedings Below. On January 11, 2002 (less than sixth months after he had been transferred to INS custody), Benitez filed a petition for a writ of habeas corpus in U.S. District Court for the Northern District of Florida, seeking his release from INS detention. J.A. 3-26. Benitez argued that the INS lacked statutory authority under 8 U.S.C. § 1231(a)(6) to detain him indefinitely following completion of the 90-day "removal period" (which began to run on July 27, 2003, when -- he alleges -- he was taken into INS custody), and also argued that his indefinite detention violated his Fifth Amendment *substantive* due process rights. *Id.* On July 11, 2002, the district judge adopted the magistrate judge's Report and Recommendation and dismissed the petition. *Id.* 44-49. The district judge held that *Zadvydas v. Davis*, 533 U.S. 678 (2001) -- in which the Court held that permanent resident aliens could not be detained indefinitely by the INS pending removal -- was inapplicable to excludable aliens such as Benitez. *Id.* 46. Neither the district judge nor the magistrate

judge addressed whether the *procedures* employed by the INS in determining that Benitez should be detained were constitutionally adequate.

On July 17, 2003, the Eleventh Circuit affirmed. *Id.* 59-83. The court noted that although a Cuban Review Panel had initially concluded that Benitez was releasable subject to certain conditions, the Panel revoked its Notice of Releasability on March 10, 2003 after it determined that Benitez was involved in a planned jail escape. *Id.* 64. The court held, "[I]nadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention." *Id.* 77. Nor did the court believe that 8 U.S.C. § 1231(a)(6) created any *statutory* impediment to Benitez's indefinite detention: "We . . . interpret *Zadvydas* as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry." *Id.* 79. The court said that its decision was supported by important national security considerations:

> The ability to exclude aliens from this country at its borders is a duty entrusted to the Executive branch so that it may protect the citizens and residents of this country from all manner of nameless dangers. Creating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country's defense of its borders. For example, it may be the case that the government will not be able to determine what potential dangers a particular unadmitted alien might pose. In such a situation, the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained. Removing this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks.

Id. 81. Benitez remains in ICE custody. However, pursuant to a Cuban Review Board order, he may be released as early as July 2004 if he successfully completes a residential drug treatment program.

Martinez filed a habeas corpus petition in July 2002 in U.S. District Court for the District of Oregon, seeking release from INS detention. The following month, the Ninth Circuit issued its decision in *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), which held that § 1231(a)(6) prohibits detention of excludable/inadmissible aliens for more than six months after they have been ordered removed from the country, if there is little prospect that they can be removed in the foreseeable future.[3] Based on the *Lin Guo Xi* decision, the district court issued a one-paragraph order in October 2002, granting the habeas corpus petition and ordering Martinez's release. Petition Appendix in No. 03-878 ("P.A.") at 2a. On August 18, 2003, the Ninth Circuit summarily affirmed; its one-page order cited *Lin Guo Xi* as the basis for its decision. *Id.* 1a. Martinez has been free from ICE detention since March 31, 2003. Pet. 9.

SUMMARY OF ARGUMENT

Section 1231(a)(6) authorizes detention "beyond the removal period" of certain categories of aliens, including aliens (such as Benitez and Martinez) who were apprehended at the border and denied entry, aliens (such as Benitez and Martinez) who are removable because of their criminal records, and aliens (such as Benitez and Martinez) who have

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[3] *Lin Guo Xi* was a purely statutory decision. It did not consider whether there are any constitutional limitations on indefinite detention of excludable/inadmissible aliens; rather, the Ninth Circuit held that its construction of § 1231(a)(6) was mandated by *Zadvydas*.

been determined to be a risk to the community. *Zadvydas* determined that, when applied to permanent resident aliens, § 1231(a)(6)'s authorization of post-removal period detention should be read as including a temporal limitation: such detention is limited to six months plus any additional period during which there remains a "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. But, as the Eleventh Circuit correctly observed, *Zadvydas*'s interpretation of § 1231(a)(6) as applied to permanent resident aliens was driven by its concern that an interpretation that authorized indefinite detention of such aliens would raise serious constitutional concerns. J.A. 80-81. Given that (as *Zadvydas* recognized) permanent resident aliens historically have been accorded significantly greater constitutional protections than have excludable aliens, there is no reason to conclude that *Zadvydas* mandates that the same strict temporal limitations be read into § 1231(a)(6) in cases (as here) involving excludable aliens.[4]

Indeed, there are strong reasons for concluding that Congress did *not* intend § 1231(a)(6) to impose such temporal limitations in cases involving excludable aliens. In particular, any such reading of § 1231(a)(6) would be wholly inconsistent with 8 U.S.C. § 1182(d)(5)(A), which grants the Attorney General broad discretion in determining whether to parole

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[4] Immigration law historically used the term "excludable" alien to refer to an alien prevented, either at or before the border, from entering the United States. Such aliens are now classified as "inadmissible." But because the term "inadmissible" also encompasses a number of other categories of aliens, *see* 8 U.S.C. § 1182(a), *amici* throughout this brief continue to use the term "excludable" alien to refer to an alien, such as Benitez or Martinez, intercepted by immigration authorities while attempting to enter the country without permission.

excludable aliens pending removal, and whether to revoke any parole previously granted.

In his opening brief, Benitez argued for the first time that his continued detention violates his procedural due process rights. Benitez Br. 47, 49. However, that issue is not properly raised. Neither Benitez nor Martinez made a procedural due process claim in the lower courts, and the lower courts did not pass upon any such claim. Because there is virtually no lower-court record regarding the adequacy of the procedures employed by the INS/ICE in determining that public safety concerns required Benitez's and Martinez's continued detention, it would be wholly inappropriate to permit them to raise that issue for the first time in this Court.

There is no sound basis for Benitez's and Martinez's claim that the indefinite detention of an excludable alien determined by the ICE to pose a threat to public safety violates his substantive due process rights. The difficulty with that argument goes beyond the fact that it is foreclosed by this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Critics of *Mezei* assert that it unfairly denied a long-time U.S. resident any hearing at which he could contest the government's secret evidence that he posed a danger to national security. But those critics (including the *Mezei* dissenters) asserted only that Mezei should have been afforded *procedural* due process rights, including an opportunity to be heard on the charges against him. There is virtually no support in the legal literature, and none in this Court's case law, for the proposition that an excludable alien apprehended at the border has a *substantive* due process right to enter the United States when he cannot find another country willing to take him, despite a finding (made following a fair proceeding) that he poses a threat to public safety.

Nor is there any basis for a claim that the Mariel Cubans are entitled to greater substantive due process rights than other excludable aliens. Benitez asserts that the Mariel Cubans were openly invited to come to this country with the understanding that they would eventually be accepted as political refugees just as soon as enough refugee slots opened up. Benitez Br. 19, 42-43. This revisionist version of history, propounded by both Benitez and his *amici*, is contrary to fact. At all times, the Carter Administration opposed the Mariel boatlift and took numerous steps to prevent it from occurring -- including attempting to persuade boat captains not to go to Mariel, attempting to prevent boats from landing at Key West, and fining and indicting boat captains who persisted. Government officials were well aware that a sizeable percentage of those coming on the boatlift were removed from mental hospitals and prisons and placed on board waiting ships by Cuban government officials. But despite screening efforts amid the chaos at Florida ports, the government was successful in detaining only a small percentage of the hardened criminals among arriving passengers; the great majority (including Benitez) slipped through the cracks. The predictable result: a violent crime wave hit Miami and other locations at which Mariel Cubans settled. Mariel Cubans were paroled into this country in large numbers because the government had no realistic alternative in light of our nation's humanitarian tradition and Castro's unwillingness to accept their return. But that parole was conditioned on good behavior. As *Zadvydas* recognized, the government is well within its rights when it chooses to detain an alien pending removal, even if the alien has nowhere else to go, if the alien violates the terms of his prior release.

Finally, a decision denying the government the power to detain indefinitely excludable aliens would pose serious national security concerns. The Ninth Circuit's decision

leaves the federal government powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. The history of the Mariel Cubans illustrates that such "dumping" operations are more than a theoretical possibility. Moreover, the recent experience with Haiti indicates that attempted illegal entry by sea of massive numbers of foreigners is an ongoing problem and that detention of such foreigners until such time as they can be repatriated may be the only effective means of dealing with the problem.

ARGUMENT

I. § 1231(a)(6) DOES NOT PROHIBIT THE INDEFINITE DETENTION OF EXCLUDABLE ALIENS WHO POSE A PUBLIC SAFETY RISK

The Court held in *Zadvydas* that, at least with respect to permanent resident aliens, 8 U.S.C. § 1231(a)(6) should be interpreted as including "an implicit limitation" on the length of time that aliens may be detained pending deportation. *Zadvydas*, 533 U.S. at 689. Although no *explicit* limitation is set forth in the statute, *Zadvydas* stated that such a congressional limitation could and should be implied, both because the statute includes no "clear indication" that indefinite detention of permanent resident aliens is permissible, *id.* at 697, and because a statute authorizing such indefinite detention "would raise a serious constitutional problem." *Id.* at 690.

Neither of the factors that led the Court in *Zadvydas* to read into § 1231(a)(6) an implicit prohibition on indefinite detention of permanent resident aliens are present in this case. First, both the language and history of the immigration laws provide an unmistakably "clear indication" that Congress did,

in fact, contemplate the indefinite detention of excludable aliens in appropriate circumstances. Second, the "serious constitutional problem" identified in *Zadvydas* is absent here, because the Court has long recognized that excludable aliens enjoy far fewer constitutional rights than aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Accordingly, there are no grounds for reading into § 1231(a)(6) a bar on indefinite detention of excludable aliens demonstrated to pose a threat to public safety.

Section 1231(a)(6) provides that certain categories of aliens "may be detained beyond the removal period." *Zadvydas* held that Congress's use of the word "may" was ambiguous in one critical respect: "[W]hile 'may' suggests discretion, it does not necessarily suggest unlimited discretion" to engage in "long-term detention of unremovable aliens." *Zadvydas*, 533 U.S. at 697. In light of its conclusion that long-term detention of unremovable resident aliens would raise serious constitutional concerns, the Court held that such detention is prohibited by § 1231(a)(6) -- even if the resident alien is adjudged a public safety risk. *Id.* at 699.

But, of course, one category of aliens whose detention is explicitly authorized by § 1231(a)(6) is any alien "who has been determined by the Attorney General to be a risk to the community." If, as *Zadvydas* held, a permanent resident alien awaiting removal cannot be held based *solely* on a determination that he poses a public safety risk, then who did Congress have in mind when it provided for such detention? Congress must have been contemplating such public-safety detention in cases involving excludable aliens, the group that historically has been afforded the lowest level of constitutional protections in connection with immigration proceedings.

Unless § 1231(a)(6) is interpreted as authorizing detention of excludable aliens based on public safety concerns, the statute's "risk to the community" language will have been deprived of all meaning -- because (based on *Zadvydas*) there is no other group whose post-removal period detention Congress could have had in mind when it explicitly authorized "risk to the community" detention.

It is no answer to suggest that Congress inserted the "risk to the community" language into § 1231(a)(6) to authorize short-term detention of dangerous excludable aliens while at the same time prohibiting any such detention for more than six months after the start of the removal period. *Zadvydas* held that § 1231(a)(6) authorizes detention of *all* removable aliens for six months following entry of a final removal order, plus any additional period during which there remains a "significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. Thus, limiting "risk to the community" detentions to that same period would effectively write the "risk to the community" language out of the statute -- in every case in which an excludable alien could be detained based on his dangerousness, he could also be detained based on the rationale set forth in *Zadvydas*.

Moreover, permitting the detention of excludable aliens based solely on their dangerousness would not constitute a congressional grant of "unlimited discretion," *id.* at 697, nor would it result in "indefinite" detention. By its plain language, § 1231(a)(6) limits such detention to those cases in which the Attorney General has determined that the excludable alien currently poses "a risk to the community," and any such determination is subject to judicial review. *Id.* at 687-88. Once that risk no longer exists, the "risk to the community" language no longer authorizes detention.

Another "clear indication" that Congress contemplated long-term detention of at least some excludable aliens can be seen in 8 U.S.C. § 1182(d)(5)(A). That statute provides that the Attorney General *may* "temporarily" parole certain aliens into the United States without having their entry deemed an "admission" into the country, but it imposes strict limits on the power to grant such parole. Moreover, the statute authorizes the Attorney General in appropriate circumstances to terminate parole and to "return" the alien "to the custody from which he was paroled." When it adopted § 1182(d)(5)(A), Congress was no doubt aware that at least some aliens at the border and seeking to be paroled into the U.S. would not readily be accepted back by their native countries. Accordingly, by adopting a statute that contemplated denial or revocation of parole for some such aliens, Congress could only have been authorizing the indefinite detention of such aliens.

Given Congress's "clear indication" that it did not intend to prohibit indefinite detention of excludable aliens demonstrated to pose a threat to public safety, the doctrine of constitutional doubt can play no role in construing the relevant statutes. "[I]f 'Congress has made its intent' in the statute 'clear, we must give effect to that intent,'" regardless of any constitutional problems caused thereby. *Zadvydas*, 533 U.S. at 697 (quoting *Miller v. French*, 530 U.S. 327, 336 (2000)).

Moreover, Congress's intent must be judged in light of the Court's pronouncements regarding constitutional limitations on detention of excludable aliens. More than 50 years ago, the Court held in *Mezei* that the potentially long-term detention of an excludable alien at Ellis Island raised no concerns under the Due Process Clause, even though the alien could find no other country willing to accept him. *Mezei*, 345 U.S. at 216. In light of *Mezei*, Congress would have had no constitutionally-based reason -- when adopting subsequent

immigration legislation touching on the detention of excludable aliens -- to avoid provisions authorizing long-term detention. Under those circumstances, any effort by the courts to impute such an intent to Congress is not a legitimate form of statutory construction.

In any event, as we explain at more length in Section III, *infra*, the Court has long recognized that excludable aliens enjoy far fewer constitutional rights than aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Regardless whether the Court is prepared to re-affirm *Mezei* in toto, there can be little doubt that Benitez and Martinez possess far fewer due process rights with respect to their immigration status than do permanent resident aliens such as Kestutis Zadvydas -- and thus the "serious constitutional problems" identified in *Zadvydas* are far less weighty in cases, as here, involving the detention of excludable aliens. Under those circumstances, the constitutional concerns that led the Court in *Zadvydas* to read into § 1231(a)(6) an implied limitation on the duration of post-removal period detention of permanent resident aliens have no bearing on whether a similar implied limitation should be read into the statute with respect to the detention of excludable aliens. *See Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) ("Statutes should be interpreted to avoid *serious* constitutional doubts, . . . not to eliminate all possible contentions that the statute *might* be unconstitutional.").

II. PROCEDURAL DUE PROCESS ISSUES ARE NOT PROPERLY BEFORE THE COURT

In his opening brief, Benitez argued for the first time that his continued detention violates his procedural due process rights. Benitez Br. 47, 49. However, that issue is not properly

raised. Neither Benitez nor Martinez made a procedural due process claim in the lower courts, and the lower courts did not pass upon any such claim. Because there is virtually no lower-court record regarding the adequacy of the procedures employed by the INS/ICE in determining that public safety concerns required Benitez's and Martinez's continued detention, it would be wholly inappropriate to permit them to raise that issue for the first time in this Court.

In his Report and Recommendation to the district court, the magistrate judge clearly understood Benitez to be raising only a *substantive* due process claim: "Petitioner asserts that mandatory indefinite detention is unconstitutional and that he is entitled to release based on *Zadvydas v. Davis*." J.A. 37. In adopting that report, the district court displayed a similar understanding. *Id.* 44-49. The Eleventh Circuit stated that Benitez was "arguing only that his indefinite detention is impermissible given the Supreme Court's decision in *Zadvydas*" -- a decision that contains no discussion of procedural due process issues. *Id.* 66. The appeals court affirmed without including any discussion of the manner by which the Cuban Review Panel arrived at its decision that Benitez should be detained pending removal.

The record in No. 03-878 is similarly bereft of any indication that Martinez complained about the fairness of the proceedings that led to his post-removal period detention. In ordering Martinez's release from detention, the Ninth Circuit cited solely to its prior decision in *Lin Guo Xi*. *Lin Guo Xi* was a statutorily-based decision: it held that *Zadvydas* required that § 1231(a)(6) be interpreted to prohibit indefinite detention of both permanent resident aliens *and* excludable aliens. *Lin Guo Xi*, 298 F.3d at 836. The Ninth Circuit made no mention of the fairness of the procedures that led to the INS/ICE decision to detain Martinez.

The ICE has adopted detailed procedures for determining whether Mariel Cubans still designated as "excludable" aliens should be paroled into the country, or whether their parole should be revoked. *See* 8 C.F.R. § 212.12. The regulations require the ICE to review all cases involving detained Mariel Cubans at least once a year. 8 C.F.R. § 212.12(g)(2). Mariel Cubans who are unhappy with parole determinations made pursuant to those regulations may seek review in the federal courts under the Administrative Procedure Act. Benitez now claims that those regulations failed to provide him with a fair opportunity to contest his detention. Because he is raising that claim for the first time in this Court and the claim has not been addressed by the lower courts, the Court should decline to address it in the first instance.

III. DETENTION OF EXCLUDABLE ALIENS DETERMINED TO POSE A PUBLIC SAFETY THREAT DOES NOT VIOLATE THE ALIENS' SUBSTANTIVE DUE PROCESS RIGHTS

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the

concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987) (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits the federal government to protect its citizens by detaining those excludable aliens who have been convicted of serious felonies, have been ordered removed from the country, and have been determined to constitute "a risk to the community" if released from detention during the period necessary to effect their removal.

Were Benitez and Martinez citizens, their detention based on dangerousness would raise serious constitutional concerns. In general, government detention of citizens violates substantive due process when imposed outside the context of the criminal justice system. *See, e.g., United States v. Salerno,* 481 U.S. 739 (1987). But, "'[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976)). *Demore* rejected a substantive due process challenge to the detention, pending completion of removal proceedings, of permanent resident aliens convicted of aggravated felonies.

Dicta in *Zadvydas* suggested that substantive due process protection extends to permanent resident aliens, such that they may not be detained indefinitely based on a finding of dangerousness if they have been ordered removed but can find no country willing to take them.[5] But *Zadvydas*'s discussion

[5] *Zadvydas*'s discussion of substantive due process is largely *dicta*, because the Court ultimately based its decision in the case on its (continued...)

of substantive due process is of little help to Benitez and Martinez, because they are excludable aliens and because *Zadvydas* emphasized repeatedly that permanent resident aliens are entitled to significantly greater constitutional protections than are excludable aliens. *See, e.g., Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). The Court explained:

> It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders. . . . But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

Id.

As *Zadvydas* noted, excludable aliens have long been deemed, for constitutional purposes, never to have entered the country -- even when their place of detention is actually within the United States and regardless that they may have been paroled temporarily into the country while they await removal. *See, e.g., Mezei*; *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958) (alien paroled into the United States pending a determination on admissibility did not effect an "entry").

[5](...continued)
interpretation of a statute, 8 U.S.C. § 1231(a)(6).

The enhanced constitutional status of permanent resident aliens in comparison to excludable aliens makes eminent sense -- the former group generally has been physically present in the United States for a longer period of time and thus has had a greater opportunity to develop close ties with our society and to assume rights and responsibilities that closely resemble those of citizens. Even when an excludable alien has been paroled into the United States for a lengthy period of time, he cannot forge societal ties to the same degree as permanent resident aliens because he knows that his parole is only temporary and is subject to revocation at any time. That is particularly true for Benitez and Martinez, who have spent a significant portion of their years in the United States behind bars and who have known since soon after coming to this country that their criminal records prevented them from ever being reclassified as permanent resident aliens. Of course, no one can know for sure when Fidel Castro will die and how long it will take his successor to normalize relations with the United States. But whether it takes two years or 20 years, Benitez and Martinez have known for many years that they will be removed to Cuba at the earliest available opportunity -- and thus that they have no reasonable basis for seeking to establish permanent ties to this society.

A. Rejection of the Substantive Due Process Claims Does Not Hinge on the Continued Validity of *Mezei*

In *Mezei*, the Court rejected due process claims raised under circumstances largely indistinguishable from the facts of this case. The Court upheld the government's decision to prevent Mezei from entering the country because it deemed him a national security risk; in response to Mezei's claim that the decision to exclude him violated his due process rights, the Court held, "'Whatever the procedure authorized by Congress

is, it is due process as far as an alien denied entry is concerned.'" *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)). The Court upheld the exclusion even though it recognized that the practical result was Mezei's indefinite detention at Ellis Island because no other country was willing to accept him. *Id.* at 216. *Mezei* dictates the rejection of Benitez's and Martinez's due process claims. Indeed, Mezei's exclusion and detention were upheld even though he had far stronger ties to the United States than did Benitez and Martinez -- he had lived in the United States as a resident alien for 25 years before traveling to Europe in 1948; his wife and family remained in Buffalo, New York; he attempted to return to the United States less than two years after his departure; and unlike Benitez and Martinez, he had no criminal record.

Benitez and his *amici* have mounted a full-scale assault on *Mezei*, asserting that it is inconsistent with due process decisions that came both before and after. *See, e.g.*, Benitez Br. 45; Brief of *amicus curiae* American Bar Association (ABA); Brief of Law Professors as *amici curiae*. But that criticism is largely beside the point. Detention of excludable aliens found to constitute a danger to public safety is constitutionally defensible without regard to whether the Court chooses to re-affirm *Mezei*. Criticism of *Mezei* has focused largely on its failure to recognize Mr. Mezei's *procedural* due process claims; but such criticism is of little benefit to Benitez and Martinez, because the Questions Presented to the Court do not encompass procedural due process claims.

The initial critics of *Mezei* were the four dissenting justices: Justices Black, Douglas, Jackson, and Frankfurter. The sole basis for their dissents was that the government had denied Mezei *procedural* due process by refusing to disclose any of the evidence upon which it based its finding that Mezei

posed a threat to national security. *Mezei*, 345 U.S. at 218 (Black, J., dissenting) ("[Due process] means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor."); *id.* at 227 (Jackson, J., dissenting) ("[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them."). Indeed, Justice Jackson explicitly rejected Mezei's claim that his indefinite confinement violated his substantive due process rights. He explained:

> Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion. . . . Nor do I doubt that due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state. . . . Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a prevention measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. . . . I conclude that detention of an alien would not be inconsistent with substantive due process, provided -- and this is where my dissent begins -- he is accorded procedural due process of law.

Id. at 222-24.

Subsequent critics of *Mezei* focused principally on its refusal to accord *any* procedural due process rights to aliens

protesting their exclusion from the United States. They noted that prior Supreme Court case law had granted at least *some* procedural due process rights to aliens defending against deportation efforts (even aliens who had been in the country only a few days before being detected),[6] and they argued that those same procedural rights should logically be extended to aliens protesting their exclusion. *See, e.g.*, Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 HARV. L. REV. 1362, 1390-95 (1953). But virtually none of the criticism has taken issue with Justice Jackson's view in dissent, that the government would have been within its rights in excluding Mezei from the country if, after a fair hearing, it had demonstrated that Mezei really did constitute a threat to public safety.

The ABA insists that *Mezei* is somehow out of step with the Court's substantive due process case law. ABA Br. 18-23. But the only cases it cites are cases involving the detention of *citizens*. As noted above, the Court has repeatedly held that aliens, and excludable aliens in particular, possess far fewer substantive due process rights than do citizens. *See, e.g., Demore* (upholding detention of aliens even though substantive due process principles would have prohibited detention of citizens in similar circumstances); *Zadvydas*, 533 U.S. at 693 (noting, in connection with discussion of substantive due process rights, that "[t]he distinction between

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[6] *See, e.g., The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1904) (proceedings are constitutionally deficient if an alien facing deportation is not afforded an opportunity to present her case, albeit that opportunity may take the form of an informal administrative hearing). The Court also held that if a person being excluded claims to be a citizen, due process requires that he be provided a hearing on his citizenship claim. *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908).

an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

Amici do not contend that the due process clause provides no substantive protections whatsoever to excludable aliens. For example, any torture of Benitez and Martinez would surely constitute conduct that "shocks the conscience" and thus would violate their substantive due process rights. But given the highly tenuous nature of their connection with the United States, any rights that both they and other excludable aliens may assert with respect to entry into the United States are easily outweighed by the right of the American people to be protected from dangerous criminals.

In sum, *Mezei*'s holding that excludable aliens lack *any* procedural due process rights in connection with their exclusion (and, indeed, that they may be excluded on the basis of secret evidence) has proven to be highly controversial. But even if the Court chooses not to re-affirm this controversial aspect of *Mezei,* it should still rule in favor of the ICE/INS because this Court's case law -- both before and after *Mezei* -- has consistently rejected substantive due process claims asserted by excludable aliens as their basis for contesting exclusion.

IV. MARIEL CUBANS ARE NOT ENTITLED TO GREATER SUBSTANTIVE DUE PROCESS RIGHTS THAN OTHER EXCLUDABLE ALIENS

Benitez and Martinez argue alternatively that even if the great mass of excludable aliens lack substantive due process rights to be free from indefinite detention, the unique position of Mariel Cubans entitles them to such substantive rights. Benitez asserts that the Mariel Cubans were openly invited to

come to this country with the understanding that they would eventually be accepted as political refugees just as soon as enough refugee slots opened up. Benitez Br. 19, 42-43. This revisionist version of history, propounded by both Benitez and his *amici*, is contrary to fact.

The Mariel boatlift began in April 1980 not through any action of the United States (which tried repeatedly to stop the boatlift), but when Cuba's Fidel Castro (acting in response to political unrest) announced that Cubans wishing to leave the country would be free to leave by boat from the port of Mariel. In response, President Carter stated that while the United States was willing to accept up to 3,500 refugees, it opposed any effort by the refugees to enter by boats. *See* "U.S. Intends to Stem Cuban Refugee Tide," *Washington Post* at A1 (April 25, 1980). Prominent Cuban-American leaders were called to a meeting in Washington on April 26 at which senior administration officials pleaded with them to end their support for the boatlift; most of the boats ferrying Cubans from Mariel were American boats that crossed over from Florida. *See* "Angry Cuban-Americans Criticize U.S. Policy on Refugees," *Washington Post* at A1 (April 27, 1980). Administration officials stated that they feared the boatlift "could swamp the country with untold thousands of people seeking to get out of Cuba," but admitted that the boatlift could not be checked "if the Florida Cuban community continues to encourage and finance it." *Id.* One government official "noted that fines of $1,000 for each person brought in illegally are being levied against boat owners engaged in the traffic, and he warned that the government w[ould] move to stiffer penalties, such as criminal prosecutions, if necessary." *Id.*

By May 1, the number of immigrants was approaching 10,000, with no end in sight. *See* "Navy Ships Will Monitor Cuban Boatlift," *Washington Post* at A1 (May 1, 1980). News

reports indicated that large numbers of criminals were included among the immigrants. U.S. Rep. Elizabeth Holzman, a supporter of the boatlift, toured the Key West docks and told the *Post*, "Just about every adult male I have talked to admitted to having been in prison in Cuba." *Id.* The Carter Administration promised to begin screening for criminals; it also stated that in an effort to slow the flood, three boats had been seized. *Id.*

The administration stated on May 5 that it was asking other countries to agree to accept a portion of the immigrants. It was within this context that President Carter, in response to a question, made the May 5 "open arms" statement upon which Benitez places so much reliance. In response to those who argued that the Navy should be preventing ships from landing in Florida, the President said, "We as a nation have always had our arms open to receiving refugees in accordance with American law." In response to Cuban-American leaders who pointed to this statement as a sign of relaxation of American policy opposing the boatlift, Presidential aide Jody Powell "said the president's remarks did not signal a change in overall refugee policy, but an attempt 'to deal with the situation as it exists.'" *See* "U.S. Will 'Open Arms' to Cuban Exiles, Carter Says," *Washington Post* at A1 (May 6, 1980). White House aides later insisted that the May 5 statement had been "misinterpreted" and that the President had always contemplated "strict enforcement of the law against illegal entry." *See* "Carter and the Cuban Influx," *Newsweek* at 22 (May 26, 1980).

By May 14, nearly 40,000 immigrants had arrived in Florida, and President Carter stepped up efforts to halt the boatlift. He "announced that beginning immediately the United States w[ould] accept only Cubans with relatives in the United States, Cuban political prisoners and those Cubans who

ha[d] taken refuge in the U.S. diplomatic mission and the Peruvian Embassy in Havana." *See* "President Moves to Halt Illegal Cuban Boatlift," *Washington Post* at A1 (May 15, 1980). The U.S. offered to provide transit to those individuals, but only if Cuba first agreed "to allow American officials to screen potential refugees in Havana to assure that they fit into one of the four categories." *Id.* Castro simply ignored that policy and continued sending out ships from Mariel. Other efforts -- including a Justice Department attempt on June 2 to turn back a freighter carrying 950 Cubans and the June 24 indictment of 78 people who brought Cubans to Florida in violation of the President's May 15 ban -- failed to stem the tide. Before Cuba unilaterally ended the boatlift on September 26, 125,000 Cubans had made there way to Florida.

No one really knows how many hardened criminals were among that group. The federal government initially detained about 1,800 of the Mariel Cubans as suspected criminals, but the great majority of hardened criminals (including Benitez) slipped through the cracks and were paroled into this country. Many law enforcement officials have estimated that about 40,000 Cuban prison inmates (including at least 20,000 "hardened criminals") were included in the boatlift. *See, e.g.*, "Castro's 'Crime Bomb' Inside U.S.," *U.S. News & World Report* at 27 (Jan. 16, 1984). Miami quickly assumed the title of "murder capital" of the nation, and official attributed at least ½ of all violent crimes in the city to Mariel Cubans. *See* "Trouble in Paradise," *Time* at 22 (November 23, 1981). Scores of domestic airline flights were hijacked to Havana in the early 1980s; more than 90% of the hijackings were attributed to Mariel Cubans.

In sum, nothing about the sorry history of the Mariel boatlift supports Benitez and Martinez's claims. The Mariel Cubans came despite active U.S. efforts to keep them away,

not (as Benitez claims) in reliance on an invitation from President Carter. Benitez could not possibly have relied on any such invitation, because he was taken from prison by Cuban officials and placed involuntarily on a boat. Moreover, the huge amount of crime attributable to the Mariel Cubans underscores the importance of permitting the government to take effective steps to exclude undesirable aliens from the country.

V. NATIONAL SECURITY CONCERNS COUNSEL GRANTING GOVERNMENT POWER TO DETAIN EXCLUDABLE ALIENS INDEFINITELY

Benitez and Martinez arrived at America's shores as part of a group of 125,000 Cubans who attempted to enter the country illegally by boat in the summer of 1980. Once it became clear that Castro would not accept their return to Cuba, the federal government had three options short of admitting the Mariel Cubans as permanent residents: (1) it could turn the boats away and allow them to founder in the high seas; (2) it could detain the Cubans; or (3) it could parole them temporarily into American society until such time as their repatriation could be arranged. The first was not a realistic option in light of our humanitarian traditions. Thus, the United States chose a combination of the second and third options -- it paroled most of the Mariel Cubans pending repatriation, except that it detained (or canceled parole for) those small number of individuals who were determined to pose a threat to public safety.

The Ninth Circuit's decision *requires* the federal government to adopt the third option as a matter of constitutional law. That decision raises serious national security concerns. It leaves the federal government powerless to prevent a foreign country from dumping all of its

undesirable citizens (or a total number of citizens in excess of our capacity to absorb them into our society) and then refusing to take them back. Indeed, the evidence is clear that the Cuban government engaged in just such a "dumping" operation in 1980 in connection with the Mariel Cubans. The Court has made clear that the federal government is entitled to control immigration as a means of protecting national security and thereby ensuring that there is "'no unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

Numerous courts have recognized that national security concerns are a legitimate basis for detaining excludable aliens pending their repatriation. For example, in upholding the INS's authority to detain excludable aliens who had arrived by boat from Haiti, the Eleventh Circuit observed:

> [T]he Supreme Court has long recognized that the exclusion process is intimately related to considerations of both national security and foreign policy. *See, e.g., Harisiades* [*v. Shaughnessy*], 342 U.S. [580,] 588-89 [(1952)] ("Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . ."); *The Chinese Exclusion Case*, 130 U.S. [581,] 606 [(1889)] (noting that threats to national security can come both "from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us").

Jean v. Nelson, 727 F.2d 957, 977 n.28 (11th Cir. 1984).

Amici recognize that *Jean* involved excludable aliens who were being detained while their exclusion/removal proceedings were ongoing. The INS did not suggest that Haiti would be unwilling to accept the return of its citizens should

their asylum claims be denied. In contrast, Benitez and Martinez have had final orders of exclusion entered against them and (at least at the time they filed their habeas corpus petitions) were facing the prospect of indefinite detention. Nonetheless, the national security concerns that animated *Jean* are equally present in this case. Unless the ICE retains the option of detaining excludable aliens who come to our shores from countries (such as Cuba) that are unwilling to accept their citizens back, there is a serious danger that we will be overwhelmed by increasing numbers of such aliens seeking to enter the United States illegally. Under the Ninth Circuit's decision, those contemplating illegal entry from such countries will be encouraged to do so because they can rest assured that they will be permitted to live indefinitely in the United States, regardless whether they qualify for refugee status and regardless whether they pose a threat to public safety. Congress could not have intended to leave such a massive unprotected spot in the nation's armor.

CONCLUSION

Amici curiae respectfully request that the Court affirm in No. 03-7434 and reverse in No. 03-878.

Respectfully submitted,

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APPENDIX A

Newspaper article from the April 18, 2004 Miami Herald:

HIGH COURT TO DECIDE FATE OF REFUGEE
Daniel Benitez, a Mariel refugee in indefinite detention, wants the U.S. Supreme Court to order his release.

By Alfonso Chardy

DENVER - Daniel Benitez may well become a figure in U.S. legal history when the Supreme Court rules on his case this year.

Benitez, a former Miami resident, is one of two cases the high court will review in October to decide whether immigration authorities can detain foreign nationals indefinitely, including Cuban Mariel inmates whose government refuses to take them back.

Benitez, 46, sums up his predicament simply.

"Let me go free or send me back to Cuba," he said in a recent interview at a federal prison near Denver.

Benitez argued in his October petition to the Supreme Court that there is no valid reason to keep him in detention because he has served his sentence and the high court itself has ruled against indefinite detention.

If the high court agrees, the decision will have a wide impact -- likely resulting in the immediate release of about 900 Mariel detainees at various federal facilities nationwide.

"This case presents an opportunity for the court to redress a long standing injustice," said Judy Rabinovitz of the American Civil Liberties Union who has been at the forefront of the issue.

Though the Supreme Court ruled in 2001 that foreign nationals cannot be detained indefinitely, it did not resolve the question of whether Mariel detainees like Benitez can go free. The reason: the court said foreigners who had technically not gained entry into the country "would present a very different

question" from those lawfully admitted or snuck in. Mariel detainees are considered stopped at the border, thus unadmitted.

The Bush administration interpreted the Supreme Court ruling as exempting Mariel detainees, but not everyone agrees with that analysis. Since the ruling, federal appeals courts have been split, some favoring release; others not.

2 Different Cases

The high court chose two radically different Mariel cases to settle the issue: Benitez, whose appeals court in Atlanta refused release, and Sergio Suarez Martinez, whose appeals court in San Francisco ordered supervised release. Benitez's rap sheet is long. He was first convicted in 1983 and was sentenced to three years probation for grand theft in Dade County. He got convicted again in 1993, also in Dade, for armed robbery, aggravated battery and unlawful possession of a firearm. He was sentenced to 20 years, but served eight.

Sweeping Law

But when Benitez was about to be released early in 2001, immigration authorities took him into custody. A sweeping 1996 law authorizes detention of foreign nationals convicted of felonies pending deportation -- even if the conviction occurred prior to passage of the law.

He started writing legal briefs, asking federal courts to release him, after the Supreme Court ruled that foreign nationals could not be detained indefinitely.

A North Florida federal court rejected his petition. He appealed to the 11th Circuit Court of Appeals in Atlanta, which appointed Jacksonville attorney John Mills to the case. But the 11th Circuit also refused to release him.

Mills then appealed to the Supreme Court asking that it clarify whether its 2001 ruling applies to foreign nationals stopped at the border.

"The statute that Congress enacted to authorize detention of an alien after removal only authorizes temporary detention," Mills said. "The only question is whether the same statute should be interpreted more harshly for Mariel Cubans."

Benitez was at a federal facility in Terre Haute, Ind., when the Supreme Court agreed to take his case. "I was watching TV and heard my name," Benitez recalled, his eyes filling with tears. "I was so excited that I cried."

Benitez has spent time in various federal prisons -- including a medium-security facility near Denver, where he talked about his case, and his life, during a two-hour interview. Divorced, he has no children.

Born in Havana in 1958, Benitez was largely raised by his mother after his father died of a heart attack when he was 10. At age 15, he said, Cuban police arrested him after he and a friend held up a market, stealing money, chickens and a sack of rice.

"My family needed food," Benitez says. "I wanted to bring food in the house. In Cuba, we didn't get anything from the government."

Jehovah's Witness

He said the government denied assistance to his family because his mother was a Jehovah's Witness. Many followers of the religion in Cuba have complained of persecution.

Benitez was still in jail when Mariel happened in 1980. Benitez, then 22, and other prisoners were put aboard a boat whose captain had gone to Mariel to pick up relatives. The Cuban government loaded thousands of criminals on the boats.

Benitez said he fondly recalled his first memory of Key West -- a speedboat whizzing by with a topless woman waving at the refugees.

"It looked like paradise," said Benitez. "Then we were given a speech by a military officer who said, 'welcome to the United States, the land of the free where you will be free.'"

The day after his arrival, Benitez was shipped to the Krome processing center, where a relative signed him out. A week later he had a job as a busboy at a restaurant. His family now wants him home.

"We are hoping the Supreme Court will order his release because there is no greater violation of human rights than to keep someone in detention when he has served his sentence," said Roberto Benitez, 52, Daniel's older brother in Hialeah.

"He's a very talented man," said Emilio de la Cal, a Miami attorney who represented Benitez in South Florida and whose wife is a cousin of Benitez. "He came from Cuba, with no schooling, and no English and now he speaks English and writes very well."

Benitez says he regrets having committed crimes, but should not be kept detained forever.

"I made mistakes," he said. "But I have paid my debt to society and I should be free."